STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs

TODD RANDOLPH VAN DOORNE,

Defendant-Appellant.

_____/

Supreme Court No. 153117

Court of Appeals No. 323643

Kent County Circuit Court No. 14-003215-FH

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

I. Did the trial court err in finding that the police officers approaching the front door of Defendant's residence, knocking on that door, and speaking with the occupant was not a search?

The trial court answered, "No."
The Court of Appeals answered, "No."
Defendant-Appellee answers, "Yes."
Plaintiff-Appellee answers, "No."

II. Where deputies approached the front door, knocked, waited for the occupant to answer, spoke with Defendant, asked to be allowed inside, asked to speak with Defendant about the investigation, read him his *Miranda* warnings to let him know he did not have to speak to them even though he was not in custody, spoke to him for some period of time, and then asked for consent to search, did their actions objectively reveal an intent to search rather than an intent to speak with Defendant at his home?

The trial court answered, "No."
The Court of Appeals answered, "No."
Defendant-Appellee answers, "Yes."
Plaintiff-Appellee answers, "No."

III. Where Defendant has not challenged the trial court's factual findings as clearly erroneous, and the trial court found that Defendant voluntarily consented to speak to the officers and consented to a search without coercion, intimidation, or threats, did the officers engage in coercive behavior?

The trial court answered was not asked this question.
The Court of Appeals was not asked this question.
Defendant-Appellee presumably answers, "Yes."
Plaintiff-Appellee answers, "No."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The People adopt the statement of facts in its Brief in the Court of Appeals, which was attached to the original answer in opposition to Defendant's application for leave to appeal, as supplemented by the trial court's findings of fact following an evidentiary hearing (attached to Defendant's application for leave to appeal in this Court). Further facts will be addressed as needed in the argument section below.

ARGUMENT

I. The law enforcement officers did not conduct a search by asking for consent to search, and therefore the Fourth Amendment is not implicated. Further, approaching Defendant's home and asking for consent to speak with him did not violate the implied license to approach a home.

Standard of Review: "Questions of law are reviewed de novo by appellate courts. A trial court's factual findings are subject to appellate review under the clearly erroneous standard." *People v Hartwick*, 498 Mich 192, 214; 870 NW2d37 (2015). "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

Discussion: The Court's order for supplemental briefing identified three separate issues, though all are related to one another. The first appears to be in two parts: (a) whether the knock and talk procedures used by the law enforcement officers violated the general public's implied license to approach Defendant's residence and (b) constituted an unconstitutional search in violation of *Florida v Jardines*, 569 US ___; 133 S Ct 1409, 1416 n 3, 1422; 185 L Ed 2d 495 (2013). The cited footnote states the following:

> The dissent insists that our argument must rest upon "the particular instrument that Detective Bartelt used to detect the odor of marijuana"—the dog. [133 SCt at 1424]. It is not the dog that is the problem, but the behavior that here involved use of the dog. We think a typical person would find it "'a cause for great alarm'" (the kind of reaction the dissent quite rightly relies upon to justify its no-night-visits rule, *post*, at 1422) to find a stranger snooping about his front porch with or without a dog. The dissent would let the police do whatever they want by way of gathering evidence so long as they stay on the base-path, to use a baseball analogy—so long as they "stick to the path that is typically used to approach a front door, such as a paved walkway." *Ibid*. From that vantage point they can presumably peer into the house through binoculars with impunity. That is not the law, as even the State concedes. See Tr. of Oral Arg. 6.

Defendant relies on obiter dictum[1] in the *Jardines* opinion that the implicit license to approach is "managed without incident by Girl Scouts and trick-or-treaters," *id.* at 1415, to create a rule that, if the action would not be undertaken by the Girl Scouts or trick-or-treaters, it cannot be done by law enforcement. Alternatively, Defendant argues that the majority's reference to the dissent and a no-night-visits rule, when such was not at issue in *Jardines*, should be treated not as obiter dictum but the crux of the case. These were not the holdings of *Jardines*, however.

The People will begin responding to the Court's directive by addressing the second part of the inquiry first, whether a search occurred. The starting point for any analysis, of course, must be with the language of the Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[2]

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[1] In *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011), this Court noted that "[o]biter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, lack the force of an adjudication" (internal quotation marks and citation omitted). The Supreme Court in *Jardines* was addressing whether a sniff by a drug dog on the curtilage of a home constituted a search. 133 SCt at 1414. Its ultimate holding in the case was: "The government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Id.* at 1417-1418. The comment about Girl Scouts and trick-or-treaters was neither necessary to determine the case before it, nor was it sufficient to reach the outcome. Similarly, comments about the time of day of any sort of police action were not necessary to the decision, sufficient to reach the outcome, or even at issue in the case before the Court.

[2] Michigan's Constitution contains similar language:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state. [Const 1963, art 1, § 11.]

The first question to be addressed, then, is whether the conduct at issue falls within the Fourth Amendment's rubric at all. The People submit it does not; the plain language of the Fourth Amendment addresses "searches" and "seizures," and since neither occurred prior to Defendant voluntarily consenting to letting the officers search his home, there cannot be a Fourth Amendment violation. Defendant's argument would require this Court to create a new rule that a request for information and cooperation is now a search or a seizure.

The trial court recognized that this was the foundational issue to be addressed, and found that what occurred here was neither a search or seizure:

> The Michigan Court of Appeals has held that a "knock and talk" does not generally violate constitutional protections because the tactic itself does not involve either a search or a seizure. *People v Frohriep*, 247 Mich App 692, 698-701; 637 NW2d 562 (2001). Accordingly, logic and common sense dictate that before police conduct can evoke "constitutional search and seizure implications, a search or seizure must have taken place." *Id*. at 699. By simply walking to the door, knocking, and asking Mr. Van Doorne if they could come in and speak with him, the KANET team clearly did not conduct a search. [8/26/14 Order of Trial Court, 4-5.]

The Court of Appeals reached the same conclusion. *People v Frederick*, ___ Mich App ___; ___ NW2d ___ (Docket No. 323642, decided December 8, 2015; slip op at 4).

The basic law on knock and talk encounters was recently summarized by the 6th Circuit Court of Appeals:

> Knocking on the front door of a home in order to speak with the occupant—a so-called "knock and talk"—is generally permissible. *United States v Thomas*, 430 F3d 274, 277 (6th Cir 2005). Though the threshold of a house is especially protected by the Fourth Amendment, *see, e.g.*, [*Welsh v Wisconsin*, 466 US 740, 748; 104 SCt 2091; 80 LEd2d 732 (1984)], and police may not gather information even from a person's front porch without

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This Court has held that Michigan's constitutional protections are "to be construed to provide the same protection as that secured by the Fourth Amendment, absent 'compelling reason' to impose a different interpretation." *People v Collins*, 438 Mich 8, 25; 475 NW2d 684 (1991).

> authorization, *Florida v Jardines*, —— US ——, 133 SCt 1409, 1414–15; 185 LEd2d 495 (2013), the police are authorized to conduct a "knock and talk" for as long as they have consent. *See Thomas*, 430 F3d at 277. When that consent ends, so does police authority to continue the interaction. *See Kentucky v King*, 563 US 452, 469–70; 131 SCt 1849; 179 LEd2d 865 (2011) ("[W]hether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.... And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time."); *United States v Spotted Elk*, 548 F3d 641, 655 (8th Cir 2008) ("[A] police attempt to 'knock and talk' can become coercive if the police assert their authority, [or] refuse to leave."). When an officer coerces a person to answer his questions, or forces his way into a private home, he exceeds the scope of a consensual "knock and talk" and thus intrudes on Fourth Amendment rights. [*Smith v City of Wyoming*, 821 F3d 697, 713 (2016).]

If an officer does not exceed the scope of a consensual knock and talk, the reverse is true: there has been no intrusion on Fourth Amendment rights.

Despite Defendant's arguments, *Jardines* did not invalidate the concept of a knock and talk. To the contrary, it quoted with approval the language and holding of its decision two years earlier that "a police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" 133 SCt at 1416 (quoting *Kentucky v King*, 563 US 452, 469; 131 SCt 1849; 179 LEd2d 865 (2011)). The sentence immediately following this quotation from *King* details exactly what the problem was that the *Jardines* Court was addressing: "But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that. *An invitation to engage in canine forensic investigation* assuredly does not inhere in the very act of hanging a knocker." 133 SCt at 1416 (emphasis added). The problem was that the officers approached the curtilage of a home without a warrant or an exception to the warrant requirement to conduct a search, in the form of a canine forensic investigation. The People acknowledge that *Jardines* is not limited to the use of a dog; it is, however, limited to searches (whether with a dog,

a thermal imaging device, a Geiger counter, or a pair of binoculars) of the curtilage of the home. Justice Scalia clarified this distinction in a different footnote:

> The dissent argues, citing *King*, that "gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach." *Post*, at 1423. That is a false generalization. What *King* establishes is that *it is not a Fourth Amendment search to approach the home in order to speak with the occupant*, because all are invited to do that. The mere "purpose of discovering information," *post*, at 1424, in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment. But no one is impliedly invited to enter the protected premises of the home in order to do *nothing but conduct a search*. [133 SCt at 1416, n 4; emphases added.]

Jardines specifically stated that it was not a Fourth Amendment violation to approach a home to speak with the occupant, even if there is a "purpose of discovering information" in the course of that conversation. That is "permitted conduct." A violation occurs when the police conduct a warrantless search of the curtilage of the home without a valid exception to the warrant requirement.[3]

Reviewing cases where courts have held that police exceeded the scope of a knock and talk and engaged in a search, thereby implicating the Fourth Amendment, should aid this Court in recognizing that actions of the law enforcement officers in this case did not constitute a search. The first, of course, is *Jardines* itself. Justice Scalia stated that the Court was deciding "whether the officers' behavior was a search within the meaning of the Fourth Amendment." 133 SCt at 1414. The Court then quoted a portion of footnote three from *United States v Jones*, 565 US —;

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[3] Based on this language from the US Supreme Court, the Court of Appeals properly rejected Defendant's "three-part test" which added a requirement that law enforcement only seek to speak with the occupant and not seek to gather information or request consent to search. *Frederick*, ___ Mich App at ___ (Slip op at 7, n 33). Such a rule would be directly contrary to footnote 4 of *Jardines*. It also answers Defendant's reliance upon a law review article seeking to eliminate the practice of a knock and talk (see Defendant's Application, 6); while law review article authors can write what they choose, Justice Scalia did not write that "it was not a Fourth Amendment violation to approach the home in order to speak with the occupant" in an effort to mean the exact opposite.

132 SCt 945; 181 LEd2d 911 (2012), a case in which Justice Scalia, writing for the Court, found that attaching a GPS device to an automobile to allow the government to track the person's whereabouts was a search. The *Jones* footnote stated in full:

> Whatever new methods of investigation may be devised, our task, at a minimum, is to decide whether the action in question would have constituted a "search" within the original meaning of the Fourth Amendment. Where, as here, the Government obtains information by physically intruding on a constitutionally protected area [an automobile, which the Court found was an "effect" of a person under the Fourth Amendment], such a search has undoubtedly occurred.[4] [*Jones*, ___ US ___, ___ n 3; 132 SCt 945, 950–951, n 3.]

Based on this analysis, the *Jardines* Court found the case before it "a straightforward one. The officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the home itself." 133 SCt at 1414. The officers were gathering information by way of a trained drug-sniffing dog to determine if there was any indication of narcotics in the home. *Id.*at 1413. It therefore found that a search had occurred.

Both *Jardines* and *Jones* referenced *Kyllo v Jones*, 533 US 27, 34-35; 121 SCt 2038; 150 LEd2d 94 (2001), where the Court held that using a thermal imaging device to gain information about the interior of a home was a search under the Fourth Amendment. In defining the conduct at issue in that case as a search, Justice Scalia, writing for the majority, noted:

> When the Fourth Amendment was adopted, as now, to "search" meant "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief." N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed.1989). [533 US at 32, n 1.]

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[4] In *Jones*, the Court also stated that in determining whether a search has occurred, "[t]respass alone does not qualify, but there must be conjoined with that ... an attempt to find something or to obtain information." 132 SCt at 951 n 5. In the context of that case, what law enforcement was attempting to find, or the information it was seeking to obtain, was constant information about the travel path of the vehicle involved via the GPS receiver; it was not attempting to obtain information by a consensual interview with the driver or drivers of the car involved.

Based on this definition, the Court held:

> We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search. [*Id.* at 34-35; internal quotation marks and citations omitted.]

Thus the Court, in *Kyllo,* found that using a device to "examine by inspection" the thermal images coming from within a home, without a warrant or exigent circumstances, was a violation of the Fourth Amendment.

Cases since *Jardines* have also addressed whether conduct was a search. In *United States v Ferguson*, 43 FSupp3d 787, 789-790 (WD Mich, 2014), the Court found a search occurred where officers, after engaging in a knock and talk with the occupants, proceeded to search the premises without obtaining a warrant or asking for consent to search; it was not until after an hour of searching the home and the property, going into various rooms and observing marijuana plants, that the officers asked for consent. "The record in this case leaves the Court with no doubt that the detectives were 'obtaining information' when they entered Defendants' garage, RV and residence [prior to asking for consent]." *Id*. at 792-893. Thus, looking into rooms to observe evidence, without a warrant or other exception, was found to be a search.

In *United States v Taylor*, 963 FSupp2d 595, 600 (SD WV, 2013), the Court held that police entry into a vehicle without probable cause or articulable reasonable suspicion, after the owner of the car had told them they could not search it, was an unconstitutional search when the purpose of the reentry was to close the windows of the car and turn on the car's fan to allow a drug dog to have a better chance of detecting narcotic odors. Thus, as in *Jardines*, a drug dog's sniff

was a search, and, as in *Jones*, a person's car was part of that person's "effects" under the Fourth Amendment.

In *State v Socci*, 166 NH 464, 470; 98 A3d 474 (2014), the New Hampshire Supreme Court found that police officers who drove to the defendant's residence to speak with him, but prior to making contact walked around the exterior of an unattached garage that was part of the curtilage of the home but not along the path to the door, making observations of suspected drug activity, conducted a search.

In *State v Popp*, 357 Wis2d 696, 708-709; 855 NW2d 471 (Wis COA, 2014), the Wisconsin Court of Appeals found that officers, who had been told they could not search a trailer but nevertheless climbed up the back steps of the trailer, peered inside the residence with flashlights, and used those observations to obtain a search warrant, engaged in an unconstitutional search. The observations they made through the windows were of things they could not have seen if they had not been standing in the yard and on the back porch. *Id.* at 709. Thus, peering into windows of a home from the curtilage constituted a search, and there was no exception to the warrant requirement when the homeowner had declined to consent to a search.

In *People v Gingrich*, 307 Mich App 656, 663; 862 NW2d 432 (2014), the Court of Appeals held that law enforcement conducted a search of the defendant's computer when the officer told an employee of Best Buy to open files of suspected child pornography without a warrant. Thus, opening and viewing computer files was found to be a search.

In *Grady v North Carolina*, ___ US ___; 135 SCt 1368, 1370; 191 LEd2d 459 (2015), the Supreme Court, in a per curiam opinion, held that "a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." It held that use of a GPS tracking system for recidivist sex offenders was a search,

and remanded the case for further proceedings to see if the search was reasonable. *Id.* at 1371. Thus, GPS tracking of a person's whereabouts was found to be a search, just as GPS tracking of a vehicle was found to be a search in *Jones*.

In *United States v Walker*, 799 F3d 1361, 1362 (CA 11, 2015), cited by Defendant in his application for leave to appeal to this Court, the Eleventh Circuit reviewed a case in which police had received information that a person with an outstanding warrant could be found at Mr. Walker's home. The officers approached Mr. Walker's home at 9 p.m., 11 p.m., and again at 5 a.m. with the intent to find the person who was arrestable on the outstanding warrant. *Id.* At their 5 a.m. approach, they found Mr. Walker inside an automobile with his head resting on the steering wheel, and the officers had stopped to figure out who it was and if the person was okay. *Id.* Mr. Walker told the officers that the person with the warrant was not at the home, and that the officers could go inside and check for that other person; in the process of checking the home, the police observed counterfeit currency and arrested Mr. Walker. *Id.* at 1363. The Eleventh Circuit found that the officers' approach to the home to ask about the person with the warrant did not manifest an objective intent to search. *Id.*[5] Mr. Walker argued that the police were searching because they approached his car to figure out who he was and whether he was the person wanted on the warrant;

[5] Note that the Court did not find it a problem to approach a home to find someone and potentially arrest that person on an outstanding warrant. The purpose was to knock, ask questions, and seek consent to find the person in the home. Thus, *Walker* appears to conflict with the Ninth Circuit's holding in *United States v Lundin*, 817 F3d 1151, 1159 (CA 9, 2016), which held that going to a residence to see if the resident was home to try and arrest him without a warrant exceeded the scope of the implied license, essentially because no one wants to be arrested. The People submit that *Lundin* misinterpreted *Jardines* because it ignored the language that the police may walk up and approach a door and knock. The occupant can ignore the knocking or tell the police to leave, but whether the purpose is to seek information about a neighbor, seek information about an occupant, seek consent to search, or seek to have a person agree to be arrested is not relevant to the analysis of whether a person can approach the door and knock.

the Eleventh Circuit did not find this argument persuasive. *Id.* at 1364. The Court also rejected his argument that a 5 a.m. approach to the home was unreasonable and exceeded the implied invitation that underlies the knock and talk exception "in light of all the circumstances surrounding the officers' actions." *Id.* at 1364. As is typically the case when assessing the reasonableness of an action, it did not impose a bright line rule but evaluated the totality of the circumstances. Admittedly, in that case, one of those circumstances included seeing a light on inside the vehicle in which the officers ultimately found Mr. Walker, but the opinion did not suggest that the result would have been different if the home was in the same condition it had been at 9 p.m. and 11 p.m. and the officers had knocked on the door of the home at 5 a.m. It also noted that "a warrantless early morning knock and talk … is *not considered a search.*" *Id.* at 1364, n 1 (emphasis added).

The Tenth Circuit has also had occasion to address a knock and talk since *Jardines.* In *United States v Carloss*, 818 F3d 988, 990 (CA 10, 2016), the Court addressed whether "No Trespassing" signs posted around a person's house and on the front door of the home revoked the implied license to approach the home. The Tenth Circuit found that, under the circumstances, "those 'No Trespassing' signs would not have conveyed to an objective officer that he could not approach the house and knock on the front door seeking to have a consensual conversation with the occupants." *Id.* The court noted that cases in the Tenth Circuit had previously found that a knock and talk consensual encounter does not contravene the Fourth Amendment, even absent reasonable suspicion. *Id.* at 992. The court also said that "*Jardines* expressly recognizes that a police officer, like any member of the public, has an implied license to enter a home's curtilage to knock on the front door, seeking to speak with the home's occupants." *Id.* It described the holding of *Jardines* as finding "that the license to approach a home and knock on the front door does not extend to permitting an officer to perform a search of the interior of the house from the porch with

the enhanced sensory ability of a trained dog." *Id*. at 993. The *Carloss* Court noted that both the majority opinion of Justice Scalia and the dissenting opinion of Justice Alito agreed that the Fourth Amendment permits police to approach the front door of a home to speak to an occupant for the purpose of gathering evidence. *Id.* In the case before it, beneath a subheading "In this case, the officers did not conduct a search when they went onto the front porch to knock on Carloss's front door", the *Carloss* Court distinguished its facts from that of *Jardines* as follows:

> The officers did not attempt to gather data about what was occurring inside the house from the front porch, nor did they take with them anything that would enhance their ability to do that, like the drug-sniffing dog in *Jardines* or the thermal imaging device at issue in *Kyllo*. Here, the officers simply went to the front door and knocked, seeking to speak consensually with Carloss. Nor did the officers uncover any incriminating evidence while they were on the front porch knocking. [*Id.*]

As a result, the *Carloss* Court determined that the officers did not violate the Fourth Amendment, even though they went to the home to speak to Mr. Carloss about a tip that they had received regarding illegal possession of a firearm and sales of methamphetamine. *Id*. at 990.[6]

In *JK v State*, 8 NE3d 222, 227 (Ind COA, 2014), another case cited by Defendant in the Court of Appeals, the Indiana Court of Appeals addressed a situation in which officers had been called to a complaint about juveniles pushing a shopping cart through the neighborhood, making

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[6] Numerous cases after *Jardines* have discussed what steps a person would need to take to revoke the implied license to approach, with "No Trespassing" signs not necessarily being sufficient depending on the other facts and circumstances, as the *Carloss* Court found was true in the case before it. 818 F3d at 994-995. See also *United States v Holmes*, 143 FSupp3d 1252, 1262 (MD Fla, 2015), where the Court summarized recent cases discussing how and whether a homeowner can revoke the implied consent to enter, including one that commented how the Fourth Circuit had made it "exceedingly difficult" for a homeowner to withdraw the implicit consent which underpins the knock and talk rule. Because there is no indication in the record that Defendant put up no trespassing signs, or had a locked gate across the front path to his home, and Defendant did not argue that he had taken steps to revoke the implied license to approach, what degree of signage or other actions to revoke consent are necessary in Michigan are not ripe for review in this case. Defendant argues that the license did not extend to this activity and therefore somehow became a search, not that law enforcement had ignored his efforts to revoke the implied license to approach.

noise, and causing dogs to bark. By the time the officers arrived a little after 1 a.m., they observed a shopping cart in the back of a pickup truck along with several other vehicles parked outside a particular address. *Id.* One officer knocked on the front door, while two others went into the back yard; one of those officers was able to see through a window and observed about a dozen empty alcohol containers. *Id.* The first officer knocked on the front door for over 45 minutes, instructing the occupants to open the door. *Id.* No one came out until a tow truck arrived to take away the vehicle with the shopping cart in it, at which point the 17-year-old owner of the truck came out; he was told to get the resident of the house. *Id.* Another 17-year-old came to the door, and the police then entered the home without a warrant and found evidence of underage drinking. *Id.* at 228. The Indiana court found that the entry of the officers into the back yard was not permissible as a knock-and-talk; there was no path or sidewalk that led to the back yard, which was enclosed in a privacy fence and by a row of pine trees, and therefore it was not a place where visitors could be expected to go. *Id.* at 230. "Thus, evidence obtained as a result of that violation – namely, the sight of empty alcoholic beverage containers – and any suspicion resulting from that evidence is tainted and subject to the exclusionary rule." *Id.* at 231. In addressing the conduct of the officer at the front door, the Indiana court considered "whether conduct that may begin as a valid knock and talk may devolve into an unlicensed physical intrusion on a protected area, resulting in an unconstitutional search." *Id.* The court noted that remaining at the house for over forty-five minutes and *demanding* entry exceeded the implied license to knock and await entry; "[w]hen a Hoosier exercises his constitutional right to remain inside his home, law enforcement may not pitch a tent on the front porch and wait in hopes of obtaining evidence." *Id.* at 232-233. The KANET members did not "pitch a tent" outside of Defendant's home, but simply knocked for a period of time sufficient to allow the occupants to come to the door, see who was present, and then

decide whether to answer the door.[7] Such was not a search, and therefore the Fourth Amendment is not implicated. Defendant's argument that approaching a door, knocking, and asking to speak to the occupants is a search cannot be reconciled with the common understanding of the word "search" in the Fourth Amendment, whether one looks at the modern understanding of the meaning of the word or looks back to the meaning of the word at the time the Bill of Rights was enacted.

While resolution of the question that asking to speak to a homeowner is not a search and therefore not covered by the Fourth Amendment should end the Court's inquiry, it has also directed supplemental briefing on whether the conduct of the law enforcement officers exceeded the implied license to approach a home. The People submit that they did not.

As the People noted in their brief in the Court of Appeals, there are numerous conceivable instances in which the community would accept a person approaching a front door in the middle of the night (People's Brief, 18). Whether it be because the visitor's car slid off into a nearby ditch on icy roads, the car broke down by some other means and assistance is requested, the neighbor's dog will not stop barking and the visitor wants to address the matter without involving the police, or a neighbor requires medical assistance (whether by virtue of an assault, an accident in their home, or any other reason), the implied license in the community to approach the front door and knock is not limited to daylight hours, banker's hours, or any other easily defined category. While most might not enjoy a late night visit, the community standards and implied license do not preclude one. Also as noted in the People's answer in this Court, there are easily imagined

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[7] It is also worth noting that the Indiana Court of Appeals did not find that approaching the home after 1 a.m. was a problem in and of itself; only when coupled with the officer's actions of remaining by the front door, knocking for over forty-five minutes, and demanding entry without a warrant or exigent circumstances was the conduct found to be constitutionally problematic. In *JK*, as well, there was no claim that the juvenile, his mother, or anyone else consented to the entry of the officers into the home; the officers simply entered after seeing JK at the door.

instances where most people would invite the police approaching the door, regardless of the time of day (People's Answer, 6-7). These could include footprints being followed from a crime scene to the back fence of the home and the police checking to see if an uninvited guest has broken into the residence, or police canvassing a neighborhood after a crime in the hopes of discovering someone who saw something suspicious. Of course, in both of these examples, if the perpetrator of the crime was legally in the home at which police knocked, that particular person might not want the interruption, but when courts attempt to establish rules for police conduct, they usually rely on the reasonable innocent person rather than what the perpetrator would prefer. See *Florida v Bostwick*, 501 US 429, 438; 111 SCt 2382; 115 LEd2d 389 (1991) ("the 'reasonable person' test presupposes an *innocent* person") (citation omitted, emphasis in original). Further, that person always retains the option of not answering the door, or revoking the implied license by telling the officers to leave.

That the implied license does not categorically prohibit a person from approaching the door at any particular hour is supported, in fact, by Defendant's reply brief in the Court of Appeals, where he acknowledged that a bright line rule based on the time of day "would certainly be unworkable" (Def's Reply Brief, 4). The People submit that, if the implied license permits a person to approach the door and knock at any time, even if the encounter might be unpleasant (such as a 4 a.m. neighborhood canvass following a shooting) or unwelcome (such as a peddler of unwanted goods or a political candidate for whom the occupant does not care), the police do not violate that implied license by doing exactly that – approaching the door and knocking. The implied license, as discussed by the Supreme Court in *Jardines*, permits coming to the door to

speak to the occupants.[8] Searches of the curtilage without a warrant or exception are excluded, but seeking to talk to the occupants is permitted. As such, the officers here did not violate the implied license.

Defendant, of course, is asking this Court to put additional limits on what the implied license might entail. The People submit that such a rule is not needed. Further, attempting to craft such a rule would be difficult on the facts before the Court. Evaluating some possible further limitations on the implied license will help demonstrate that other rules would not change the result in this case, or are unworkable, and therefore do not provide this Court with a suitable mechanism for defining such limits.

If this Court were to evaluate the circumstances from the perspective of what the officers actually did and whether a hypothetical reasonable innocent person would find them "reasonable," to use the language of the Fourth Amendment, the actions of the KANET officers here would appear to be something this hypothetical person would accept and, in fact, prefer over other options. Testimony at the evidentiary hearing established that one of the reasons a knock and talk was done in lieu of seeking a search warrant was because it would be less public, and potentially keep Defendant's name from appearing in the media as a drug suspect (7/2/14 Tr, 24), which would be particularly beneficial if it turned out Defendant was actually in compliance with the Michigan

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[8] "Jardines conceded nothing more than the unsurprising proposition that *the officers could have lawfully approached his home to knock on the front door in hopes of speaking with him*." 133 SCt at 1415, n 1 (emphasis added). As the *Jardines* Court's explanation makes clear, it is not the specific purpose for knocking on the door that matters, as police are unlikely to be selling cookies, providing flyers for a new restaurant in the area, or offering information on the path to true enlightenment. If the general public can approach the door and knock, the police can use that same authority to approach and ask to speak to the occupants, including seeking consent to search. "Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do." *Id*. at 1416 (quotation and citation omitted).

Medical Marijuana Act, MCL 333.26421 *et seq*. In other words, the KANET officers were attempting to provide a courtesy to Defendant. Further, there was testimony that knock and talks are generally less invasive, with the occupants of the house not handcuffed nor guns drawn, as would usually occur with a search warrant execution (*Id.*, 68-69). Recognizing that a person in a home can always refuse to answer the door, or tell the people at the door to leave, a reasonable innocent person would presumably prefer to have a less intrusive and less public means of sorting out a criminal investigation, particularly where, as here, Defendant did not think he had done anything wrong and therefore did not think he had anything to hide (7/14/14 Tr, 14-15).

Defendant's application for leave in this Court appears to offer an alternate standard, that the police are not allowed to come to a person's house late at night "absent a compelling emergency (such as 'your house is on fire') or a warrant" (Def's Application, v). The problem with the first option is that it is, at best, unworkable. What would constitute "a compelling emergency," and, more importantly, how would law enforcement officials be able to determine if a situation was compelling enough *ex ante* to avoid later constitutional problems? If the police are canvassing a neighborhood after a major terrorist incident, would that qualify? An armed robbery? An unarmed robbery? An assault with intent to do great bodily harm? Felonious Assault? Home Invasion 1st Degree? 2nd Degree? 3rd Degree? Aggravated Stalking? Misdemeanor stalking? Aggravated Assault? Operating While Intoxicated Causing Serious Impairment? Operating While Intoxicated by an unknown driver who might have enough priors to make it a third, fifth, or tenth offense, or perhaps none so the crime is a misdemeanor? If the police receive a Silent Observer tip that a person wearing a particular outfit has a gun hidden in the pocket of a sweatshirt, and a person matching the description is seen entering a home at 3 a.m. and turning off the lights, is that enough to justify further investigation? If the person making the observation was not able call the police

for 30 minutes, or enough officers for safety purposes are not able to assemble for an hour, is it still permissible to knock on the door? Is it still "compelling"? Is it an "emergency"? Because these questions are not answerable *ex ante*, it explains why Defendant's proposed rule is unworkable. If this Court simply follows the language of *Jardines* that approaching a home to speak to the occupants is not a Fourth Amendment violation, 133 SCt at 1416 n 4, such questions need not be resolved because they will not be a factor.

Defendant's argument appears to be more rooted in the second part, which is that the police should have been required to seek a warrant. This view, however, was rejected by the Supreme Court in *King*:

> Some courts, in applying the police-created exigency doctrine, fault law enforcement officers if, after acquiring evidence that is sufficient to establish probable cause to search particular premises, the officers do not seek a warrant but instead knock on the door and seek either to speak with an occupant or to obtain consent to search.
>
> This approach unjustifiably interferes with legitimate law enforcement strategies. There are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired. Without attempting to provide a comprehensive list of these reasons, we note a few.
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> First, the police may wish to speak with the occupants of a dwelling before deciding whether it is worthwhile to seek authorization for a search. They may think that a short and simple conversation may obviate the need to apply for and execute a warrant. See *Schneckloth v Bustamonte*, 412 US 218, 228; 93 SCt 2041; 36 LEd2d 854 (1973). Second, the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant. A consensual search also "may result in considerably less inconvenience" and embarrassment to the occupants than a search conducted pursuant to a warrant. *Ibid*. Third, law enforcement officers may wish to obtain more evidence before submitting what might otherwise be considered a marginal warrant application. Fourth, prosecutors may wish to wait until they acquire evidence that can justify a search that is broader in scope than the search that a judicial officer is likely to authorize based on the evidence then available. And finally, in many cases, law enforcement may not want to execute a search that will disclose the existence of an investigation because doing so may interfere with the acquisition of additional evidence against those already under suspicion or evidence about additional but as yet unknown participants in a criminal scheme.

> We have said that "[l]aw enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause." *Hoffa v United States*, 385 US 293, 310; 87 SCt 408; 17 LEd2d 374 (1966). Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution. [563 US at 466-467.]

It should be noted that *King* was an 8-1 decision. The lone dissent was from Justice Ginsburg, who advocated a rule that warrants must be obtained if there is probable cause, 563 US at 473, and whose suggestion was clearly rejected by the rest of the Court.

Judge Servitto, the dissenting judge in the Court of Appeals, advocated for this rejected position by noting, "Significantly, at least two of the officers testified that they had enough probable cause to obtain search warrants for the homes but did not do so[.]" *Frederick*, ___ Mich App at ___ (Servitto J, dissenting; slip op at 7). The dissenting judge, in summarizing why she would find a Fourth Amendment violation, said one of the reasons "was the officers' failure to advance any objectively reasonable motivation why they could not … proceed with obtaining a warrant." *Id.* This ignores the holding of *King* that whether a warrant could have been obtained "imposes a duty that is nowhere to be found in the Constitution." 563 US at 467. To rely at all on a factor that the United States Supreme Court could not have been more clear in rejecting helps demonstrate why the dissenting judge's argument should not be accepted by this Court.[9]

Another difficulty is that Defendant does not explain specifically what rule he believes that law enforcement should be constrained to follow. He simply repeats that "absent an invitation or

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[9] Judge Servitto also claimed there was no "objectively reasonable motivation" for not delaying their investigation. The People addressed this argument in the answer to the application for leave to appeal (pp 3-4), and will not repeat the argument in full here. We simply note that the potential risk for loss of evidence, commented on by several of the officers, provided an "objectively reasonable motivation" for not delaying the investigation.

an emergency" the police should not be allowed to knock on a door at 5:30 a.m. (Def's Application, 18). As noted, a reliance on "an emergency" is too amorphous, and a reliance on the time is not supported by the language of *Jardines* or a common understanding of when people might be allowed to approach a home.[10] In his reply brief in the Court of Appeals, Defendant denied any reliance upon a bright line rule for the time of day, acknowledging that such "would certainly be unworkable" (Def's Reply Brief, 4). In that document, despite repeatedly emphasizing the time of the encounter as what takes this out of the implied license to approach, his proposal was to use a test whereby "the officer must: (1) approach the home by way of the front path (or its functional equivalent); (2) have the objective intent to interview the occupants, not to conduct a search; and (3) knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave" (*Id.*). To effectuate this test, Defendant proposed asking whether a neighbor observing the police would "believe the officers had a warrant and were performing a raid, or would they believe

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[10] Defendant cited to *United States v Lundin*, 47 FSupp3d 1003 (ND Cal, 2014), for the proposition that the time of day matters to the constitutionality of the knock and talk. The case was further appealed to the Ninth Circuit, which held "that the officers violated the Fourth Amendment when they knocked on the door at 4:00 a.m. without a warrant with the intent of arresting Lundin, and that the immediately ensuing search was illegal." *US v Lundin*, 817 F3d 1151, 1155 (CA 9, 2016). With all due respect to the Ninth Circuit, the reasoning of the *Lundin* case is fundamentally flawed. It ignored the language of *Jardines* that approaching a door and knocking is not a search; further, in that case, the defendant fled out the back door and was in his back yard when police ordered him to put his hands in the air and come towards them. *Id*. at 1156. The case was thus easily decided not upon the time of the knocking, but on the police seizing the defendant by ordering him out of and away from the curtilage of his home without a warrant or exigent circumstances. An officer can ask a person who is subject to warrantless arrest to leave his home and come with the police, and some people might agree to do so in the hopes of clearing the matter up or wanting to be cooperative. If the person has not acceded to the request, however, the police cannot then order the person to come with them. This is true no matter the time of day. *Lundin* might have reached the right result, but its reasoning is inconsistent with *Carloss* and *Jardines*. Further, even the Ninth Circuit acknowledged that there might be some reasons "for knocking that a resident would ordinarily accept as sufficiently weighty to justify the disturbance." *Id.* at 1159. This returns us to the line drawing problem of determining *ex ante* whether something is "sufficiently weighty."

that the officers were merely seeking consent to search?" (*Id.* at 5). The People note that this test has virtually nothing to do with the time of day or the other complaints of violating an implied license that Defendant posited in either the Court of Appeals or this Court. It does not focus on when the police arrive, but what they do. The difficulty is that the Supreme Court already described what the police can and cannot do – they can approach the door to speak to the occupant for information and/or to seek consent to search, but they may not do so to do "*nothing but conduct a search*." 133 SCt at 1416, n 4 (emphasis added). As argued *supra*, the Court of Appeals properly rejected this three-part test because it requires rewriting the language of the Supreme Court's decision.

Defendant also argues that the intent of the officers is relevant to whether they violated the implied license. While this spills into the second issue on which this Court has requested supplemental briefing, the People point out that the trial court's factual findings, which Defendant has never argued were clearly erroneous, were that the officers approached the residence to speak to Defendant and see if he would consent to a search (8/26/14 Opinion and Order, 2, 5). This action was intended "as a courtesy" because of Defendant's employment (*Id.* at 2). When Defendant answered the door, he was asked if the police could speak with him and Defendant allowed them inside (*Id.*, 2-3). Thus, the factual finding of the trial court, after a lengthy evidentiary hearing, was that the intent of the officers was to do exactly what they did – knock at the door and seek voluntary cooperation. While not discussed in the trial court's order, the testimony at the evidentiary hearing was that if no one answers a door at an attempted knock and talk, the team would have walked away and considered its other options (7/2/14 Tr, 9), and if the

person says that he will not speak to them, then the team will leave (*Id.*, 22).[11] Defendant's claim that the KANET officers were going to search the home no matter what is not supported by the trial court's factual findings, nor by the testimony at the evidentiary hearing. Their intent was to do that which the Supreme Court, in *King* and *Jardines*, said was permissible – approach the front door (or reasonably accessible side door given the weather) by the main path, knock, and see if the occupants would speak to them about their investigation. That was their purpose, and that purpose is constitutionally permissible under the implied license.

II. The conduct of the officers revealed on objective intent to do exactly what they did, which was to knock at the door, speak to the occupants, talk to them about a criminal investigation, and seek consent to search.

The second issue this Court requested supplemental briefing on was "whether the conduct of the law enforcement officers 'objectively reveals a purpose to conduct a search' to obtain evidence without the necessity of obtaining a warrant", citing *Jardines*, 133 SCt at 1417.

As noted *supra*, the Court in *Jardines* said that it was determining whether the actions of the police in going up to a person's house and having a drug dog gather information that was then used in a search warrant was "a search within the meaning of the Fourth Amendment." 133 SCt

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[11] See also the testimony from Deputy Tuinhoff: "If he wouldn't have consented, then maybe we would have had met (sic) and talked about whether we were going to obtain a search warrant for his house" (6/30/14 Tr, 36). Deputy Butler testified that a knock and talk was quicker and more convenient, and "[e]ighty percent of people cooperate" (*Id.*, 67); by implication, approximately twenty percent do not cooperate and a different method would be required. Sergeant Kaechle, when asked to describe a knock and talk, testified, "You essentially get a tip there's maybe some criminal activity at this residence. You may not have enough information at hand to get a search warrant, but instead you go to the home and try to meet up with the individual and knock on the door and try to talk to the individual, to allow us into the home and to allow us to further our investigation by either talking to us and making a statement or clearing them self up" (*Id.*, 88). The sergeant testified that, at a knock and talk, officers cannot push their way into a home, and "if the individual said I don't want to talk to you and you're not allowed in my home or on my property, then we would have to leave" (*Id.*, 89).

at 1414. The Court specifically stated that it was not overruling *King*. *Jardines*, 133 SCt at 1416. Using Defendant's proposed standard of a three-part test, as discussed *supra*, would require exactly that result.

Part of Defendant's argument about the officer's "objective intent" is based on a claim that the police pounded loudly, and this would cause a third-party observing the scene to think that a raid was happening rather than an effort to speak with the occupants. The difficulty with this argument is that the Supreme Court in *King* noted that the respondent in that case proposed a remarkably similar rule, and the Supreme Court rejected it:

> Respondent contends that law enforcement officers impermissibly create an exigency when they "engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable." Brief for Respondent 24. In respondent's view, relevant factors include the officers' tone of voice in announcing their presence and the forcefulness of their knocks. But the ability of law enforcement officers to respond to an exigency cannot turn on such subtleties.
>
> Police officers may have a very good reason to announce their presence loudly and to knock on the door with some force. A forceful knock may be necessary to alert the occupants that someone is at the door. Cf. *United States v Banks*, 540 US 31, 33; 124 SCt 521; 157 LEd2d 343 (2003) (Police "rapped hard enough on the door to be heard by officers at the back door" and announced their presence, but defendant "was in the shower and testified that he heard nothing"). Furthermore, unless police officers identify themselves loudly enough, occupants may not know who is at their doorstep. Officers are permitted—indeed, encouraged—to identify themselves to citizens, and "in many circumstances this is cause for assurance, not discomfort." *United States v Drayton*, 536 US 194, 204; 122 SCt 2105; 153 LEd2d 242 (2002). Citizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers. Others may appreciate the opportunity to make an informed decision about whether to answer the door to the police.
>
> If respondent's test were adopted, it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. The Fourth Amendment does not require the nebulous and impractical test that respondent proposes. [*King*, 563 US at 468-469.]

It should be remembered that the officers in *King* "'banged on the door as loud as [they] could' and announced either 'Police, police, police' or 'This is the police.'" 563 US at 471. There was no evidence that the police demanded entry or threatened to break down the door if it was not opened voluntarily. *Id.* at 462 n 4. The Supreme Court held that "[t]his conduct was entirely consistent with the Fourth Amendment[.]" *Id.* at 471.

In this case, the KANET officers were following the directive of the United States Supreme Court that it is permissible, indeed encouraged, to clearly identify themselves as representatives of law enforcement. Defendant seeks to use essentially the same test advocated by the respondent in *King*, and it would still be a "nebulous and impractical test". How loud is too loud? How many decibels are constitutionally permissible? Would it vary depending on whether someone lives in a small residence or a large one? Would it vary if someone lives in the relative quiet of the country compared to a busy roadway in a city? Would it vary if the person might be sleeping? If music or a television could be heard playing from inside? Such problems exist whether the concern is a police created exigency rule or a is-a-knock-and-talk-really-a-knock-and-talk rule based on the volume of the knocking by the police.

The objective manifestation of the KANET officers' actions is based on what they did, which was to knock on the door, wait for an answer for a reasonable period of time, and then ask to speak with the occupant. As was testified to at the evidentiary hearing, the officers knew that if a person at a knock and talk declines to speak with them or give consent to search, they would need to leave and either abandon that portion of the investigation or determine if they have sufficient information for a search warrant. See n 11, *supra*. Instead, Defendant opened the door, agreed to speak with the officers, was told his name came up in a criminal investigation, and was read his rights under *Miranda v Arizona*, 384 US 436; 86 SCt 1602; 16 LEd2d 694 (1966) to inform

him that he did not need to speak with the officers (even though, since he was not in custody, such warnings were not required) (8/26/14 Opinion and Order, 2-3). He also was given a consent to search form that clearly indicated he did not need to consent, and he chose to do so after being given time to read the form (*Id.*; also see Appellate Exhibits 3 and 4 attached to People's Brief in the Court of Appeals).

The objective intent of the officers in *Jardines* was to have the drug dog sniff the front porch of the residence; there is nothing in the record of that case to suggest that the officers ever attempted to make contact with the occupants. The objective intent of the officers in *Jones* who surreptitiously placed a GPS tracking device in a car was to gather information about the location of the vehicle and, presumably, its occupants. In a case where the police wander around the curtilage to gather information after no one answered their knocks at the door, such actions manifest an objective intent to conduct a search *and* exceed the implied license to approach, knock, and leave if no one answers, or the police are told to leave. See *United States v Troop*, 514 F3d 405, 410 (CA 5, 2008). In a case such as *JK* where the police go past a privacy fence and peer through windows of a home from an enclosed back yard, their objective intent is to conduct a search. Where an officer followed an invited guest into a carport without an invitation, and then told the people he encountered not to move until back up arrived, *United States v Perea-Ray*, 680 F3d 1179, 1188 (CA 9, 2012), such actions manifested an intent to seize the people rather than engage in a consensual conversation.

In a case where the police demand entry (depending on the surrounding facts), it might be the case that such use of their authority would manifest an intent to enter regardless of consent.[12]

[12] The Supreme Court in *King* suggested that such conduct might be a problem, without deciding the issue. 563 US at 462 n 4. Because other circumstances might exist that justify such a demand,

"To be clear, it remains permissible for officers to approach a home to contact the inhabitants. The constitutionality of such entries into the curtilage hinges on whether the officer's actions are consistent with an attempt to initiate consensual contact with the occupants of the home." *Perea-Ray*, 680 F3d at 1187-1188.

Defendant attempts to portray the actions of the KANET officers as evidencing an intent that they were going to enter the house and search regardless of whether consent was given or not. As the Court of Appeals correctly noted, however, such a claim is only based on rank speculation and not on anything in the record. The People will not repeat in detail the findings of the Court of Appeals, see *Frederick*, ___ Mich App at ___ (slip op at 12-13), but agree that Defendant's description of seven officers descending on his home in full tactical gear is a mischaracterization of the record and does not comport with the factual findings of the trial court. To the extent that Defendant objects to the police seeking consent to search, such action is *not* the same as a search itself. As the Court of Appeals stated:

> [T]he officers' intent is most clearly demonstrated by their conduct at each home. As in any ordinary knock and talk, the officers approached each home, knocked, and waited for a response. When Frederick and Van Doorne responded, the officers explained the purpose of their visits. Both men were provided their *Miranda* rights and asked to voluntarily consent to a search. The officers made no attempt to search for evidence until obtaining consent to do so. That the officers proceeded in this manner clearly demonstrates that it was their intent to speak with each individual and obtain their consent before proceeding any further. Frederick's and Van Doorne's contention that the officers would have conducted a warrantless search with or without their consent is purely speculation. Thus, we conclude that the officers' purpose did not exceed the scope of the implied license as articulated in *Jardines*. [*Id.*]

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such as a reasonable belief that a person is injured inside the home and in need of medical care, the People would suggest that a blanket pronouncement on such facts as are not before the Court should be avoided.

Because the objective and subjective intent was to knock, talk, and ask for consent, and the actual facts demonstrated that there were no threats or other coercive tactics used (8/26/14 Opinion and Order, 3-4, 7), the answer to this Court's query is that the officers did not demonstrate an intent to search without a warrant if voluntary consent was not given to search.

III. As found by the trial court after the evidentiary hearing, the conduct of the KANET officers was not coercive and therefore Defendant's consent to search and to speak with the officers was voluntarily given.

The Court has also requested briefing on whether the knock and talk procedure was coercive. In *United States v Spotted Elk*, 548 F3d 641, 655 (CA 8, 2008), the Eighth Circuit stated, "While a police attempt to 'knock and talk' can become coercive if the police assert their authority, refuse to leave, or otherwise make the people inside feel they cannot refuse to open up, in this case there are no facts that would show that [the defendant] had reason to feel she had to open up. The encounter happened at mid-day, [the officer] did not command her to open the door, nor was there any suggestion that his knocking was unusually persistent. The district court found that [the defendant] opened the door of the motel room of her own accord, and that finding is not clearly erroneous." While the encounter here was not at mid-day, the trial court's factual findings were that no threats or coercion was used, and this finding was supported by the testimony at the evidentiary hearing.

Once again, the People note that Defendant did not argue the trial court's factual findings were clearly erroneous in his application to this Court, or in his brief in the Court of Appeals. Thus, the factual findings of the trial court should be binding for this review, not only because of

the lack of objection but because the findings were fully supported by the testimony.[13] As a result, the relevant facts and conclusions for this Court are as follows:

> As [described earlier in the trial court's opinion,] Mr. Van Doorne's testimony shows that he was not intimidated or coerced by the number of officers at his home or the amount of knocking by Lt. Roetman and Sgt. Kaechle. Further, even though this encounter happened at 5:30 a.m., Mr. Van Doorne's testimony establishes that his primary motivations for granting the consent and waiver were that he feared possible employment ramifications if he refused and that he did not believe he had broken the law and, therefore, had nothing to hide.
>
> Again, the KANET members did not state or imply that Mr. Van Doorne was required to sign the consent or waiver. They also made no indication that Mr. Van Doorne's decision might affect his employment status. The KANET members gave Mr. Van Doorne the Consent to Search form and provided him with adequate time to review and consider it before he signed it. The KANET members also read Mr. Van Doorne his *Miranda* rights, gave him a card that stated those rights, and provided him with adequate time to review the card and consider his options before signing it. Mr. Van Doorne was lucid during this time and participating appropriately in his conversation with KANET members. For this reason, the Court concludes that there was no indication of coercion, intimidation, or deception and that Mr. Van Doorne gave both the consent and waiver freely, voluntarily, knowingly, and intelligently. [8/26/14 Opinion and Order, 9-10.]

To find on this record that the conduct was coercive would require this Court to discount the trial court's factual findings nearly *in toto*, despite the fact that the trial court was in the best position to observe the witnesses and make the factual findings. While the People acknowledge that time of day is one of many factors to consider in deciding if consent was coerced or voluntarily given,[14]

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[13] For a comprehensive review of the testimony presented, see the People's Counter-Statement of Facts (People's Court of Appeals Brief, 1-14).

[14] See *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999): "Whether consent to search is freely and voluntarily given is a question of fact based on an assessment of the totality of the circumstances[;]" and *Bustamonte*, *supra*, 412 US at 226 (listing factors to consider in evaluating a person's consent, including the age of the person, his education and intelligence, whether he was advised of his rights, the length of any detention, whether the questioning was repeated or prolonged, and the presence or absence of physical punishment such as deprivation of sleep or food). Because the trial court had to review "the totality of the circumstances," the time of the encounter would necessarily be relevant. The People are not aware of any case, however, which makes the time of the encounter dispositive.

the trial court also understood this dynamic ("even though this encounter happened at 5:30 a.m.") and found that the testimony that Mr. Van Doorne was coherent, lucid, and appropriately responding to the questions asked of him weighed against the factor of the time of day. Its conclusion that Defendant's consent was not the product of duress or coercion but was free and voluntary appropriately considered the totality of the circumstances, and its ultimate decision was not clearly erroneous.

Defendant argues that the officers stayed too long. This was not a case in which the officers knocked for forty-five minutes, however; they merely stayed long enough to allow an occupant to get to the door and respond. As the Eighth Circuit stated in response to a comparable argument, "We decline to place a specific time limit on how long a person can knock before exceeding the scope of this implied license. Here, the officers testified that they knocked 'for several' minutes or 'a minute or two' … There is no suggestion that the officers knocked aggressively or demanded entry." *Carloss*, 818 F3d at 998. In this case, the testimony on the knocking at Defendant's home was: "I know there may have been - - I shouldn't say confusion, but because they were initially knocking on what you would think is the front door, and then he actually came to the lower portion of the residence door. So, with the ice and all that, it took a little longer, but [about two or three minutes]" (6/30/14 Tr, 32 – Deputy Butler); "Mr. Van Doorne's was a little longer. He's got a two-story home. We couldn't get upstairs to where the front door was due to the ice buildup. It was very treacherous in the driveway. We had to knock right next to the garage where he's got a stairway" (7/2/14 Tr, 15-16 – Lt. Roetman); "For Mr. Van Doorne 5:30 is not out of the norm. He works at 7, so 5:30 is probably the norm he would get up" (*Id.*, 20). The trial court's written opinion stated the officers "knocked for a few minutes before Mr. Van Doorne answered" (8/26/14 Opinion and Order, 2). This conduct does not evidence an intent to coerce consent to search, but

simply conduct to ensure that the people inside know that someone is at the door, and to give the person an opportunity to respond.

The trial court listened to the testimony of the witnesses, and determined that threats or deception were not used, and the ability of Defendant to appropriately respond to the questions of the officers demonstrated an ability to voluntarily consent. Further, Defendant testified that he was 48 years old (7/14/14 Tr, 6), had completed an associate's degree from Grand Rapids Junior College including their accredited police academy (*Id*., 6-7), he had completed twenty hours of continuing education and training annually as part of his job (*Id.*, 7), part of his training had been on investigative interview techniques (*Id*.), he had no learning disabilities or other cognitive impairments (*Id.*, 11), he was able to read and write the English language (*Id.*), and he acknowledged having either read or had read to him both a constitutional rights card and a consent to search form before he signed either (*Id.*, 11-12). Defendant admitted he allowed the officers into his home and up into the kitchen area (*Id.*, 13), that no guns were ever drawn nor was he nor any member of his family handcuffed during this incident (*Id.*, 12-13). The officers did not demand entry, nor did they demand compliance. Based on the record, there was no clear error in the trial court's factual findings, and therefore there is no basis to find that the officers' behavior was legally coercive to vitiate the consent Defendant gave to enter his residence, waive his *Miranda* rights, or allow a search of his home.

RELIEF REQUESTED

THEREFORE, for the reasons stated herein, the People respectfully pray that Defendant's Application for Leave to Appeal be denied, or that the opinion of the Court of Appeals be affirmed.

Respectfully submitted,

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Dated: July 22, 2016

By: /s/ James K. Benison
James K. Benison
Chief Appellate Attorney